

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ARNOLD VALDEZ)	
Claimant)	
)	
VS.)	
)	
MORNING SUN)	
Respondent)	Docket No. 1,047,060
)	
AND)	
)	
NEW HAMPSHIRE INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the January 27, 2010 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh (ALJ).

ISSUES

The ALJ found that the claimant failed to prove by a preponderance of the evidence that he suffered a right knee injury arising out of and in the course of his employment with respondent and therefore his request for medical treatment to the right knee was denied.

The claimant requests review of this decision alleging the ALJ erred. Claimant argues that he has met his burden of proof by his own testimony and corroborated by the medical records and Dr. Prostic's examination and resulting report. Claimant asks the Board to reverse the ALJ and find that he has proven it is more likely than not that he sustained an accidental injury arising out of and in the course of his employment on July 24, 2009.

Respondent argues that the Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The ALJ's recitation of the facts is detailed and well-supported by the record. Accordingly, this Board Member will adopt the recitation as her own and repeat only those facts that are necessary to explain this decision. Distilled to its essence, the parties' dispute stems from claimant's alleged July 24, 2009 accident. Respondent denies claimant sustained a compensable injury and/or provided the notice required by K.S.A. 44-520. After considering the evidence presented at the preliminary hearing, the ALJ denied claimant's request for medical treatment. He provided the following reasoning:

The court is presented with two possibilities. Either the claimant sustained and reported a knee injury on July 24, 2009 and was therefore fired the following Monday, or the claimant never hurt his knee at work and fabricated the story the day after he was fired.

The medical records tend to support the latter possibility as there was no objective evidence of injury to the knee, only the claimant's subjective complaints of pain. The fact of the claimant doing roofing work since the alleged injury also tends to show there was no injury.¹

The ALJ goes on to conclude:

The claimant failed to prove by a preponderance of the evidence that he suffered a right knee injury arising out of and in the course of employment. The claimant [']s request for medical treatment of the right knee is denied.²

This Board Member has reviewed the same evidence presented to the ALJ and concludes the ALJ's preliminary hearing Order should be affirmed.

As noted by the ALJ, the evidence suggests two versions of the facts, both of which cannot simultaneously exist. Claimant says he sustained an injury on Friday, July 24, 2009 and notified his supervisor immediately thereafter.³ Greg Cobb denies this.⁴ Claimant says he reported to work the next day and told them he could not work because he had to take

¹ ALJ Order (Jan. 27, 2010) at 2.

² *Id.*

³ *Id.* at 9.

⁴ *Id.* at 59, 62.

his wife to the hospital.⁵ He says he told Greg “that my leg was hurting me and I needed to see a doctor”.⁶ Mr. Cobb says he was not at work on Saturday the 25th. Claimant then testified he did not go to the hospital on Saturday, nor did he seek any sort of medical treatment for himself on Saturday or Sunday.⁷ While he was at the hospital with his wife on Monday his “knee had give away over one of those, what do they call those things, those concrete deals where you park, and it had popped again.”⁸ He sought treatment the next day (July 28, 2009). That record refers to pain starting Friday night at work and “again last night” and an inability to move his knee.⁹ Yet, upon examination, his knee demonstrated normal motion and no pain was elicited by movement. There was some tenderness with ambulation.

Claimant was terminated from his job for his failure to show up as scheduled. Friday July 24, 2009 was his last date of work. This workers compensation claim followed.

Although the medical records show that claimant has solely subjective complaints of pain relative to his right knee as of Tuesday, July 28, 2009, the ALJ was not persuaded that these complaints were attributable to a work-related accident. Rather, he concluded that claimant manufactured this claim once he found out he was being fired.

Under these facts and circumstances, this Board Member is inclined to agree with the ALJ’s analysis and therefore affirms the preliminary hearing Order. Obviously, his determination included an evaluation of the witnesses’ and their credibility. The ALJ had the opportunity observe claimant and both of respondent’s witnesses testify. And after considering their testimony and the exhibits offered at the hearing, he concluded that the greater weight of the evidence supported the respondent’s defense. This Board Member agrees. Therefore, the ALJ’s preliminary hearing Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹⁰ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

⁵ *Id.* at 17-18.

⁶ *Id.* at 18.

⁷ *Id.*

⁸ *Id.* at 19.

⁹ *Id.*, Resp. Ex. 2 at 50 (7/28/09 report from Community Health Center of Southeast Kansas).

¹⁰ K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated January 27, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2010.

JULIE A.N. SAMPLE
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge